

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

EFRAIN SUAREZ DELGADO,

Defendant.

No. CR-04-188-FVS

FINDINGS AND CONCLUSIONS

THE DEFENDANT came before the Court for sentencing on July 29, 2005.

FINDINGS

The Court finds the Presentence Investigation Report is accurate except as otherwise indicated.

CONCLUSIONS

On November 17, 1999, Efrain Suarez Delgado was convicted in the Eastern District of Washington of the crime of conspiracy with intent to distribute marijuana. He served his sentence and was released from prison. During 2004, new drug-trafficking charges were filed. A superseding indictment alleged both conspiracy to distribute cocaine and distribution of cocaine. On February 14, 2005, the government filed an information advising Mr. Delgado of its intent, in the event of conviction, to seek enhanced punishment based upon the 1999 judgment. 21 U.S.C. § 851. Mr. Delgado exercised his right to a jury trial. The jury convicted him of both counts. If his 1999 conviction constitutes a "felony drug offense," he is subject to a

1 ten-year mandatory minimum sentence pursuant to 21 U.S.C. §
2 841(b)(1)(B)(ii). Mr. Delgado has filed a sentencing memo that
3 raises three issues with respect to the government's request for a
4 mandatory minimum sentence: (1) whether, in view of *Apprendi v. New*
5 *Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), he is
6 entitled to have a jury determine whether his 1999 conviction is a
7 felony drug offense; (2) whether the government's decision to seek a
8 mandatory minimum sentence violates the separation-of-powers
9 doctrine; and (3) whether a mandatory minimum sentence violates a
10 defendant's right to due process by limiting a judge's ability to
11 consider mitigating factors.

12 The *Apprendi* rule is easily stated. "Other than the fact of a
13 prior conviction, any fact that increases the penalty for a crime
14 beyond the prescribed statutory maximum must be submitted to a jury,
15 and proved beyond a reasonable doubt." 530 U.S. at 490, 120 S.Ct. at
16 2362-63. Mr. Delgado faces at least two obstacles in his effort to
17 invoke the protections established by *Apprendi*. First, in *Harris v.*
18 *United States*, 536 U.S. 545, 568-69, 122 S.Ct. 2406, 2420, 153
19 L.Ed.2d 524 (2002), the Supreme Court held that mandatory minimum
20 sentences are not subject to the *Apprendi* rule. Mr. Delgado argues
21 that *Harris* is no longer supported by a majority of the members of
22 the Supreme Court. He argues that, given the opportunity, the
23 Supreme Court will hold that mandatory minimum sentences are subject
24 to *Apprendi* rule. Even if Mr. Delgado is correct, he faces a second
25 obstacle. In adopting *Apprendi*, the Supreme Court specifically
26 exempted judicial fact-finding concerning prior convictions from the
scope of the rule. Although Mr. Delgado acknowledges this exception,
he submits it has been misconstrued by lower courts. Citing both
Section III of *Shepard v. United States*, 544 U.S. ----, ----, 125

1 S.Ct. 1254, 1262-63, 161 L.Ed.2d 205 (2005), and Justice Thomas's
2 concurring opinion in *Shepard*, he submits the prior-conviction
3 exception is much narrower than previously thought. See, e.g.,
4 *United States v. Ngo*, 406 F.3d 839, 842 (7th Cir.2005); *United States*
5 *v. Washington*, 404 F.3d 834, 840-41 (4th Cir.2005). According to Mr.
6 Delgado, a sentencing judge may resolve a dispute concerning a prior
7 conviction -- e.g., whether a prior conviction constitutes a "felony
8 drug offense" -- only if the record contains documents whose
9 significance is conclusive. Mr. Delgado denies this is such a case.
10 Consequently, he maintains he has a right under the Sixth Amendment
11 to have a jury determine whether his 1998 conspiracy conviction
12 constitutes a "felony drug offense" within the meaning of 21 U.S.C. §
13 841(b)(1)(B). This argument is unpersuasive. While Mr. Delgado may
14 be correct in asserting that *Harris* no longer commands the support of
15 a majority of the members of the Supreme Court, the fact remains
16 that, to date, the Supreme Court has not seen fit to overrule *Harris*.
17 Unless and until the Supreme Court does so, mandatory minimum
18 sentences are not subject to the *Apprendi* rule. Thus, Mr. Delgado
19 does not have a right to have a jury decide whether his 1998
20 conviction is a felony drug offense. This conclusion is not affected
21 by *United States v. Booker*, 543 U.S. ----, 125 S.Ct. 738, 160 L.Ed.2d
22 621 (2005). As the Ninth Circuit observed recently, "*Booker* does not
23 bear on mandatory minimums[.]" *United States v. Cardenas*, 405 F.3d
24 1046, 1048 (9th Cir.2005).

25 Mr. Delgado argues that government's decision to seek a
26 mandatory minimum sentence usurped the Court's sentencing authority,
thereby violating the separation of powers doctrine. This argument
is without merit. It is well established that Congress' decision to
authorize United States Attorneys to seek mandatory minimum sentences

1 under 21 U.S.C. § 841(b)(1) does not violate the separation-of-powers
2 doctrine. *United States v. Kinsey*, 843 F.2d 383, 393 (9th Cir.),
3 *cert. denied*, 487 U.S. 1223, 108 S.Ct. 2882, 101 L.Ed.2d 916 (1988).

4 Mr. Delgado argues that the government's request for a mandatory
5 minimum sentence violates his right to due process of law by
6 effectively precluding the Court from considering factors that might
7 warrant a sentence of less than 10 years in prison. This argument is
8 without merit. As a general rule, the limits that Congress imposes
9 upon a sentencing judge's discretion do not violate the defendant's
10 right to due process by depriving him of an individualized sentence.
11 *United States v. Brownlie*, 915 F.2d 527, 528 (9th Cir.1990)
12 (mandatory minimum sentence under 21 U.S.C. § 841(b)(1)). See also
13 *United States v. Brady*, 895 F.2d 538, 539 (9th Cir.1990) (Sentencing
14 Guidelines).

15 **THE COURT SO FINDS AND CONCLUDES.** The District Court Executive
16 is hereby directed to enter this order and furnish copies to counsel.

17 **DATED** this 2nd day of August, 2005.

18 s/Fred Van Sickle
19 Fred Van Sickle
20 United States District Judge
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